

ELECTRONICALLY
FILED
Apr 28 2016
U.S. DISTRICT COURT
Northern District of WV

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**KAYLA BUTTS, Individually and
On behalf of her daughter A.F.,
A Minor,**

Plaintiffs,

**BERKELEY MEDICAL CENTER;
WEST VIRGINIA UNIVERSITY
HOSPITAL, INC.;
SHENANDOAH WOMEN'S HEALTH
CENTER; SHENANDOAH
COMMUNITY HEALTH CENTER;
SHENANDOAH MIDWIVES;
AVINASH PUROHIT, M.D.;
TRACY SWALM, CNM;
SARA SPURGEON, RN;
SHELLY PALKOVIC, RN;
REBECCA PFENDER, CNM;
SARAH HARDY, M.D.; and
SONYA JUSTICE, RN.
UNITED STATES OF AMERICA**

Defendants.

**Civil Action No. 3:16-CV-53 (Groh)
(Removal of case 16-C-175 from the Circuit
Court of Berkeley County, West Virginia)**

NOTICE OF REMOVAL

The United States of America, by William J. Ihlenfeld, II, United States Attorney for the Northern District of West Virginia, and Erin Carter Tison, Assistant United States Attorney for said District, hereby respectfully files this Notice of Removal based upon the following:

1. Shenandoah Women's Health Center and Shenandoah Community Health Center, which are part of Shenandoah Valley Medical System, Inc.¹ ("Shenandoah"); Tracy Swalm, CNM; Rebecca Pfender, CNM; and Sarah Hardy, MD, are defendants in Civil Action No. 16-C-175 now pending in the Circuit Court of Berkeley County, West Virginia. Civil Action No. 16-

¹ The United States is not aware of any entity known as "Shenandoah Midwives" as referenced in the style of the Plaintiffs' Complaint.

C-175 was commenced against said Defendants, and others, by the filing of Plaintiffs' Complaint on or about April 7, 2016. (Copies of this pleading are attached hereto as Exhibit 1).

2. At the time of the incidents alleged in the Complaint, Tracy Swalm, CNM; Rebecca Pfender, CNM; and Sarah Hardy, MD, were employees of Shenandoah, which was an entity receiving federal grant money from the United States Public Health Service pursuant to 42 U.S.C. §§ 254b or 254c. Pursuant to 42 U.S.C. §§ 233(g) and (h), the United States Department of Health and Human Services (HHS) deemed Shenandoah and its employees eligible for malpractice coverage under the Federal Tort Claims Act (FTCA) effective January 1, 2013. (A copy of the deeming letters of HHS is attached hereto as Exhibit 2.)

3. The Attorney General, by the United States Attorney for the Northern District of West Virginia, has certified, pursuant to 42 U.S.C. § 233(c) and 28 U.S.C. § 2679(d), that Rebecca Pfender, CNM; Tracy Swalm, CNM; Sarah Hardy, MD and Shenandoah were acting within the scope of their employment at the time of the incidents alleged in the complaint, and that, pursuant to 42 U.S.C. §§ 233(g) and (h), Rebecca Pfender, CNM; Tracy Swalm, CNM; Sarah Hardy, MD; and Shenandoah are deemed to be employees of the United States for FTCA purposes only for any acts or omissions in connection with their employment that occurred after January 1, 2013. (A copy of the Certification of Scope of Employment as referenced herein is attached as Exhibit 3).

4. Both 42 U.S.C. § 233(c) and 28 U.S.C. § 2679(d)(2) provide that upon certification by the Attorney General that a defendant was acting within the scope of employment at the time of the incident out of which the action arose, any civil action or proceeding commenced in a State Court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States of the district and division

embracing the place in which the action or proceeding is pending and, thereafter, that the action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of Title 28, United States Code, and all references thereto. Thus, the requisite certification having been obtained regarding Rebecca Pfender, CNM; Tracy Swalm, CNM; Sarah Hardy, MD; and Shenandoah, the removal of this action is ripe.

5. Title 28 U.S.C. § 2679(d)(2) further provides that the Certification of Scope of Employment “shall conclusively establish scope of office or employment for purposes of removal.”

WHEREFORE, this action now pending in the Circuit Court of Berkeley County, West Virginia, is properly removed therefrom to this Court pursuant to Title 28, United States Code, Section 2679(d)(2) and Title 42, United States Code, Section 233(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Erin Carter Tison, hereby certify that on April 28, 2016, a true and correct copy of the foregoing Notice of Removal has been sent to counsel for all parties by U.S. Mail, addressed as follows:

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